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Nos. 96-552 and 96-553

In The

Supreme Court of the United States

October Term, 1996

RACHEL AGOSTINI, ET AL.,

Petitioners,

v.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET ANO.,

Petitioners,

v.

BETTY-LOUISE FELTON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FAMILY RESEARCH COUNCIL, FOCUS ON THE FAMILY, LUTHERAN CHURCH-MISSOURI SYNOD, NATIONAL ASSOCIATION OF EVANGELICALS, AND SOUTHERN CENTER FOR LAW AND ETHICS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The interest of each *amicus curiae* is set forth in the appendix to this brief. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

This case raises the question whether this Court should reopen and overrule its decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), which held that the Establishment Clause of the First Amendment prohibits the government from furnishing remedial education services to eligible parochial school children on the premises of their religious school. These *amici* agree with petitioners that *Aguilar* was wrongly decided and should be overruled in this proceeding.[1] However, these *amici* believe that the issue in this case extends well beyond the circumstances of the Title I remedial education program. *Aguilar* is not just an isolated or anomalous decision. It is representative of a line of holdings by this Court requiring that government assistance be denied to otherwise eligible individuals and organizations, solely on the basis that the assistance will be used in a setting in which religion will be taught or practiced. This line begins with *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and culminates in *Aguilar* and its companion case, *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985).

In the case of the Title I program itself, this approach has caused some of the neediest students in America to be denied remedial educational assistance, or to receive the assistance in ways that are both more costly and less

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[1] *Amici* agree with petitioners that it is appropriate to reopen *Aguilar* in this proceeding under Federal Rule of Civil Procedure 60(b) but leave discussion of that point to them.

effective. In other cases, children who attend religious schools have been denied a variety of educational resources that states wish to provide to all students on a nondiscriminatory basis. In each such case, the secular educational purpose of the states has been frustrated, and the students have been penalized for their exercise of a constitutionally protected right.

The constitutional evil is the same no matter what educational resource is denied to otherwise eligible students. Lines drawn between books and maps, textbooks and transportation, building maintenance and school lunches, tuition tax credits and tuition tax deductions, film projectors and computers, diagnostic and therapeutic services, and the like, are impossible to administer and have no basis in constitutional principle. The rights of students attending nonpublic schools should not depend on matters of form, but on the substance of the programs.

In the opinion of these *amici*, this Court should expressly adopt the teaching of recent cases, which in essence hold that government aid is constitutional under the Establishment Clause whenever (1) it serves a legitimate governmental purpose, such as education, (2) it is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, (3) it is made available to a broad array of beneficiaries, both religious and secular, on a nondiscriminatory basis, and (4) any religious element is the result of the genuinely independent and private choices of individuals and families. If an aid program satisfies these constitutional criteria, the government should not be required – indeed, it should not be permitted – to discriminate on the basis of the constitutionally protected choices of the students or the constitutionally protected speech and identity of the schools they choose. The government should be neutral.

The holding of *Aguilar* and like cases is not just an extreme application of sound principle; it turns the Religion Clauses on their head. Instead of neutrality, *Aguilar* requires discrimination. Instead of respecting individual choice and conscience, *Aguilar* places the weight of governmental power in opposition to religious education. Poor families eligible for Title I assistance are put to a painful and unnecessary choice: if they select the schools that, in their religious judgment, are most appropriate for their children, they forfeit benefits to which they would be entitled under law (or receive those benefits in a burdensome manner). This is a classic penalty on the exercise of a constitutional right, and should not be permitted (let alone required).

These *amici* believe the Court should take the opportunity of this case to return to the principle of "government impartiality, not animosity, towards religion." *Board of Education, Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring).

ARGUMENT

I. The Religion Clauses Should Be Read As Complementary Provisions Designed To Secure Religious Freedom By Preventing Government From Encouraging Or Discouraging Religion

The most fundamental problem in Religion Clause jurisprudence is to determine how the two religion guarantees, free exercise and non-establishment, interact. As many Justices of this Court have observed, at least some of the current doctrine interpreting the Free Exercise and Establishment Clauses appears to create a "tension" between the clauses. *Wallace v. Jaffree*, 472 U.S. 38, 81-82 (1985) (O'Connor, J., concurring); *Thomas v. Review Board*, 450 U.S. 707, 720-21 (1981) (Rehnquist, J., dissenting);

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973); *Walz v. Tax Commission*, 397 U.S. 664, 668-69 (1970). The Free Exercise Clause plainly forbids Congress (and after incorporation in the Fourteenth Amendment, *any* government) to discriminate against religion. But the Establishment Clause has been interpreted, in cases such as *Aguilar*, to forbid any aid that will or even may be used to advance religious purposes. In a world in which the government aids or advances many different causes and institutions, this means that the government *must* discriminate against religion in distributing benefits. The Establishment Clause is said to require what the Free Exercise Clause forbids.

Amici believe that it is crucial for this Court to enunciate an interpretation of the Religion Clauses that is complementary and harmonious. The prohibition on establishments and the guarantee of free exercise do not mean opposite things. Rather, as Justice Goldberg put it, the two clauses "are to be read together, and in light of the single end which they are designed to serve": to "promote and assure the fullest possible scope of religious liberty and tolerance for all, and to nurture the conditions which secure the best hope of attainment of that end." *Abington School Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

The Establishment Clause guarantees that government power will not be used to reward or induce the exercise of religion in general, or of any particular religion; the Free Exercise Clause guarantees that government power will not be used to penalize or inhibit the exercise of religion in general, or of any particular religion. Together, the Religion Clauses guard against the use of government power to control, interfere with, reward,

or punish the institutions, beliefs, and practices of religion. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001 (1990) ("[T]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."). *Amici* refer to this approach as one of "substantive neutrality" toward religion.

The framers of the First Amendment did not view the two parts of the Religion Clauses as separate and independent – let alone as mutually incompatible. The two principles were advocated with equal intensity by the same persons (particularly Baptists and other fervent Protestant sects) and for essentially the same reason: to diminish government power and control over religion.[2] The two clauses were a unified whole – "a double declaration of what Americans wanted to assert about Church and State." Thomas Curry, *The First Freedoms* 216 (1986).

While Madison, Jefferson, and other disestablishmentarians of the founding generation opposed the use of the government's taxing power for the *promotion* of religion, they never suggested that religious institutions be denied access to public benefits that are supplied on a nondiscriminatory basis. It is one thing to say that government may not tax citizens for support of a church, and quite another to say that, when government supports education, it must discriminate against schools that have

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[2] Initially, the sole purpose of the First Amendment Religion Clauses was to diminish *federal* government power over religion, leaving the several states with discretion to determine for themselves whether to establish a religion and what protection, if any, to provide for the exercise of religion. After incorporation through the Fourteenth Amendment, the First Amendment now applies to all levels of government.

a religious component. It is illogical to presume that, because the founding generation rejected *favoritism toward* religion, it must have favored *discrimination against* religion.

II. This Court's Decisions Regarding Assistance To Otherwise-Eligible Religious Individuals And Organizations Are Fundamentally Inconsistent And Create Conflicts Between The Free Exercise And Establishment Clauses

As Justice O'Connor has noted, Establishment Clause doctrine in cases involving government assistance to religious organizations has by now developed into two identifiable lines of cases. *Rosenberger v. Rector of Univ. of Virginia*, 115 S. Ct. 2510, 2525 (1995) (O'Connor, J., concurring). It is *amici*'s contention that these two lines are in irreconcilable conflict, and that one of them – the line of cases that includes *Aguilar* – should give way because it is also fundamentally inconsistent with the Free Exercise Clause.

In a line of cases including *Rosenberger* itself, and beginning with *Bradfield v. Roberts*, 175 U.S. 291 (1899), and *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court has permitted the participation of religious institutions and individuals in programs of assistance – cash, in-kind benefits, access to government facilities, tax benefits – so long as the terms of the program were neutral. For example, the Establishment Clause does not mandate that the government suppress or disfavor the expression of private individuals and groups simply because the expression is religious. *Capitol Square Review Board v. Pinette*, 115 S. Ct. 2440 (1995); *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). Likewise, government may not, and certainly need not, disqualify individuals from receiving

government benefits simply on the basis that they choose to use them in a religious setting. *Rosenberger v. Rector of Univ. of Virginia*, 115 S. Ct. 2510 (1995); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dept. of Services*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). By permitting religious individuals and groups to speak and to share in general public benefits, the government avoids using its power in a discriminatory way to discourage religious expression or exercise.

The key question under this "governmental neutrality" approach is whether the government has favored religion over non-religion in setting or administering the program's terms. If the aid is "made available generally, without regard to the sectarian-nonsectarian, or public-nonpublic, nature of the institution benefited, and is in no way skewed towards religion," it does not violate the Establishment Clause. *Witters*, 474 U.S. at 487-88 (citation omitted). See also *Zobrest*, 509 U.S. 1; *Mergens*, 496 U.S. 226; *Texas Monthly v. Bullock*, 489 U.S. 1 (1989); *Mueller*, 463 U.S. 388; *Walz v. Tax Commission*, 397 U.S. 664 (1970).

These decisions rest on two premises. First, the Establishment Clause is not meant to " 'prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief.' " *Rosenberger*, 115 S. Ct. at 2521 (quoting *Everson*, 330 U.S. at 16). The Clause "prohibit[s] the government from favoring religion," but it "does not demand hostility to religion, religious ideas, religious people, or religious schools." *Board of Educ., Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring). Second, the "advancement" of religion that the Establishment Clause prohibits is only *government* action fostering religion. The Establishment Clause does not prohibit, and the Free Exercise and Free Speech Clauses protect, private religious speech and activity. "A law is not unconstitutional

simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987). In other words, this "government neutrality" approach coincides with the proposition that government should neither encourage nor discourage religion, relative to other activities and ideas.

This line of cases is in fundamental conflict with another line of cases, beginning with *Lemon v. Kurtzman* and culminating in *Aguilar v. Felton*, which insisted that the state must be "certain" that none of the resources provided to religiously affiliated institutions are used to "inculcate religion" (*Lemon*, 403 U.S. at 619). See, e.g., *Grand Rapids*, 473 U.S. at 385 (the Establishment Clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); *Levitt v. Committee for Public Education*, 413 U.S. 472, 480 (1973) ("the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination").

The underlying theory of this "no religious uses" approach is that taxpayers may not be compelled to support religious activity, even pursuant to neutral and generally available benefit programs. Since religious teaching and practice pervade many of the activities of religious schools, these cases have repeatedly denied even neutral aid, of undoubted educational value, to students in these schools.

Recently, the Court has more and more indicated its approval of the "neutrality" approach. In *Rosenberger*, for example, the Court stated that "a significant factor in

upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion," and it called this "[a] central lesson of our decisions." 115 S. Ct. at 2521. But the Court has also stopped short of rejecting the "no religious uses" position (see *id.* at 2523; *id.* at 2526 (O'Connor, J., concurring)). These *amici* believe that the two approaches are irreconcilable. It is not logically possible for the government to treat eligible recipients neutrally, neither favoring nor disfavoring religion, and at the same time insist that only purely secular uses be permitted. As we will discuss *infra* in Part III-A (pp. 15-23), any attempt to "compromise" between these two rules – applying one rule to some cases, and the other rule to other cases – is bound to produce the kind of arbitrary distinctions that have led many members of this Court to express dissatisfaction with Establishment Clause doctrine.

Amici urge this Court to adopt the "government neutrality" approach and explicitly repudiate the "no religious uses" approach for the whole range of cases involving governmental assistance. The proposition that activities receiving government funding must be cleansed of all religious elements or activity virtually ensures that religious schools or other religious organizations must be denied generally available aid solely on the basis of their religious commitments – precisely the discrimination forbidden by the Free Exercise Clause. It is the "no religious uses" that has turned the Establishment Clause, in practical effect if not in intent, into a principle of "hostility to religion" (*Kiryas Joel*, 114 S. Ct. at 2498 (O'Connor, J., concurring)).

The approach of the *Lemon/Aguilar* line of decisions is at war with the most basic understandings of free exercise. To begin with, there is no doubt that seeking an education under religious auspices is a right protected

under the Free Exercise Clause. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 788 (1973); see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In cases such as *Aguilar*, moreover, there is no doubt that individuals and schools are denied benefits solely because of the exercise of that right. If the students affected by *Aguilar* had attended private schools devoted to progressive politics, militarism, feminism, or Afrocentrism, the state would have been able to provide Title I remedial services to them on school premises. Because their school was religious, however, the students were denied the ability to receive these benefits on the same terms as other needy children.

This result strikes at the heart of the Free Exercise Clause, which, "[a]t a minimum," prohibits the state from discriminating against conduct "because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). And in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court stated that government may not "impose special disabilities on the basis of religious views or religious status" (*id.* at 877), and that any law or governmental action that is "specifically directed at . . . religious practice" is subject to "strict scrutiny" (*id.* at 877-78). This test involves "the most rigorous of scrutiny," as the Court said in *Lukumi*; "[a] law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases." 508 U.S. at 546.

The Free Exercise Clause forbids the state from withholding a civil privilege or benefit on account of a person's exercise of religious freedom. In *McDaniel v. Paty*, 435 U.S. 618, 626 (1978), the Court held that a state may not "condition[ ] the exercise of one [right (in that case, the right to run for state legislative office)] on the surrender of the other" (the right to free exercise, in that case

the choice of a ministerial career). See also *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (forbidding state to deny unemployment compensation to woman who refused to work on her Sabbath, because the denial of benefits "force[d her] to choose between following the precepts of her religion" and receiving otherwise-available benefits).[3]

The *Aguilar/Lemon* decisions deny educational resources to students attending religious schools that are provided to all similarly situated students who attend secular schools, whether public or private. The result is to use the state's funding power to put financial pressure on parents to forego their constitutionally protected right to educate their children in a religious setting. See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv. L. Rev. 989, 1017-22 (1991).[4]

The *Aguilar/Lemon* cases cannot be characterized as a mere refusal to subsidize the teaching of religion. They effectively penalize the exercise of religion by excluding religious individuals and schools from secular educational benefits for which they would otherwise qualify.

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[3] The same principles apply to the guarantee of free speech, including speech that is religious. Government may not deny a speaker benefits, including financial assistance, if the denial is based on the speaker's religious viewpoint. See *Rosenberger*, 115 S. Ct. at 2517-20; *Lamb's Chapel*, 508 U.S. at 393-94; *Widmar*, 454 U.S. at 268-70.

[4] We do not suggest that the government would be unconstitutionally discriminating against religion if it gave assistance only to public schools. The First Amendment prohibits discrimination against religion – not discrimination between government-operated and private institutions. The guarantee of neutrality is breached only when, as in the case of Title I, the government extends aid to students attending secular private schools while still withholding it from (or providing it in a burdensome fashion to) students attending religious schools.

See *Nyquist*, 413 U.S. at 784 n.39 (even if the primary effect of a program is "to promote some legitimate end under the State's police power," a program must be invalidated if it "also has the direct and immediate effect of advancing religion"); *Meek v. Pittenger*, 421 U.S. 349, 365-66 (1975) (holding that an otherwise permissible program must be held unconstitutional simply because it gives "[s]ubstantial aid to the educational function of [religious] schools"); *Grand Rapids*, 473 U.S. at 395 (forbidding "direct aid to the educational function of the religious school").

This is inconsistent with basic principles of constitutional law. As Justice William O. Douglas commented in an analogous context:

> The fact that government cannot extract from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.
>
> These considerations, however, are not relevant here. If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-Day Adventist, but as an unemployed worker. . . .

Sherbert v. Verner, 374 U.S. at 412-13 (concurring opinion). By the same token, students eligible to receive federally funded remedial educational assistance will do so not as parochial school students, but as economically and educationally disadvantaged youngsters. They should not be denied educational assistance simply because they have chosen religious schools, any more than Mrs. Sherbert should have been denied unemployment benefits for

keeping her Sabbath. These *amici* do not claim that the government must subsidize *religion*, but do claim that, in subsidizing *education*, it must be neutral toward religion.

The distinction between a refusal to fund and a penalty is illustrated by two free speech cases. In *Cammarano v. United States*, 358 U.S. 498 (1958), this Court upheld a tax regulation forbidding business to deduct the costs of lobbying. The effect was to require businesses to bear the full costs of engaging in political activity; government simply refused to subsidize the activity through tax deductions. But in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court struck down a statute forbidding publicly subsidized broadcasters from editorializing, and withholding all federal funds to those that did. The statute went beyond refusing to fund editorials; a station was effectively "barred from using even wholly private funds to finance its editorial activity." 468 U.S. at 400.

The *Aguilar/Lemon* approach is analogous to that in *League of Women Voters*. There can be little doubt that religious schools contribute a secular educational value that falls within the scope of purposes of most educational assistance programs. As Justice Powell observed, religious schools "have provided an educational alternative for millions of Americans; and in some States they relieve substantially the tax burden incident to the operation of public schools." *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (concurring in part and dissenting in part). See Anthony S. Bryk, et al., *Catholic Schools and the Common Good* (Harvard Press 1993). Yet *Aguilar* and *Lemon* deny almost all aid to religious schools, even aid that matches and is limited to the educational value the schools provide. See McConnell, *Selective Funding*, *supra*, at 1017-22.

By contrast, the "government neutrality" approach is consistent with the nondiscrimination required by the Free Exercise Clause. This approach, indeed, harmonizes

the free exercise and nonestablishment principles around the central theme of minimizing government's influence over the decisions of the people with respect to religious matters. So long as the program of benefits is neutral and generally available, the fact that it is also available to religious individuals and organizations should create no inducement to religion. A neutral program creates no incentive to choose religious schools; "[i]f the subsidy is no greater than that given to students in secular schools, . . . [t]hose who choose religious education are neither better off nor worse off than those who prefer secular education." McConnell, *Selective Funding, supra*, at 1021. If Title I or some other form of aid is available to the same extent at both secular and religious schools, any incentive effects from government actions will be eliminated one way or the other. The decision about what school to attend will be left, as it should be left, to the family.[5]

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[5] The "neutrality" approach does not mean that any government action that takes religion specifically into account is unconstitutional. Some programs or statutes, called "accommodations of religion," single out religion for the legitimate purpose of removing obstacles to religious choice. See *Kiryas Joel*, 114 S. Ct. at 2492 (approving of such accommodations as long as they are neutral among sects); *Amos*, 483 U.S. 327 (upholding accommodation specifically targeted to religious organizations). The neutrality guaranteed by the Religion Clauses is not "formal," requiring that government always treats religion the same as other activities. Rather, it is "substantive" neutrality, requiring that government minimize the effect it has on religious practice. See Laycock, *Neutrality, supra*. A contrary understanding would produce the anomalous consequence that an accommodation of religion that promotes the purposes of the Free Exercise Clause might be deemed unconstitutional. See *Wallace v. Jaffree*, 472 U.S. at 81-82 (O'Connor, J., concurring). Under our proposed test, the "effects" test of the Establishment Clause prohibits only those actions that give preferential treatment in a way that gives inducements or incentives to religious exercise.

It may seem that the Court need not address the Free Exercise Clause in this case. The Elementary and Secondary Education Act already entitles students attending religious nonpublic schools to benefits comparable to those extending to their peers, and the only question is whether their eligibility for benefits violates the Establishment Clause. Nonetheless, the free exercise issue is central to the correct disposition of the establishment issue. The most powerful reason to reject the reading of the Establishment Clause set forth in *Aguilar* and *Lemon* is that it violates rights under the Free Exercise Clause. This approach must be overturned in order, in Justice O'Connor's words, to bring "Establishment Clause jurisprudence back to . . . the proper track – government impartiality, not animosity, towards religion." *Kiryas Joel*, 114 S. Ct. at 2498 (concurring opinion).

III. This Court Should Adopt A New Standard For Evaluating The Constitutionality Of Aid To Education, Based On Government Neutrality Toward Religion

A. The Great Weight Of Precedent Holds That Government May Extend Aid To Religious Schools On A Neutral And Nondiscriminatory Basis

This Court has held in case after case that the Establishment Clause is *not* offended when benefits are extended evenhandedly, under neutral criteria, to a broad and diverse range of viewpoints and activities. The second Justice Harlan stated the principle of government neutrality toward religion as follows:

> As long as the breadth of [the benefit] includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be anti-theological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit * * * to organized religious groups.

Walz v. Tax Commission, 397 U.S. 664, 697 (1970) (concurring opinion). To similar effect, Justice Brennan stated in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14-15 (1989), that "[i]nsofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." In *Witters v. Department of Services*, 474 U.S. 481 (1986), the Court held that aid does not violate the Establishment Clause if it is " 'made available generally, without regard to the sectarian-nonsectarian, or public-nonpublic, nature of the institution benefited,' and is in no way skewed towards religion." *Id.* at 487-88 (quoting *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 782-83 n.38 (1973)). See also *Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2491 (1994) ("we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges"); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993) ("we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge"); *Lee v. Weisman*, 505 U.S. 577, 606 n.8 (Souter, J., concurring) (the Establishment Clause is not violated when "the State has, without singling out

religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by clearly secular criteria"); *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384, 395 (1993); *Board of Education v. Mergens*, 496 U.S. 226, 248, 252 (1990); *Mueller v. Allen*, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981). Indeed, in the first of this Court's "school aid" cases, Justice Black warned that "we must be careful, in protecting the citizens * * * against state-established churches, to be sure that we do not inadvertently prohibit [the State] from extending its general state law benefits to all its citizens without regard to their religious belief." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

While no majority opinion in this line of cases purports to supply a comprehensive set of criteria, these *amici* believe that these holdings can be distilled into the following: Aid is constitutional under the Establishment Clause if (1) it serves a legitimate governmental purpose, such as education, (2) it is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, (3) it is made available to a broad array of beneficiaries, both religious and secular, on a nondiscriminatory basis, and (4) any religious element is the result of the genuinely independent and private choices of individuals and families.

Under this standard, the Title I program is plainly constitutional. The remedial educational resources unquestionably are serving a legitimate governmental purpose (whether or not they also have an incidental beneficial effect on religion). The allocation formula used under Title I is based strictly on population and need, which are neutral and objective criteria. All students and essentially all schools are permitted to participate on a nondiscriminatory basis. Finally, since the decision to choose a religious or a secular school is exercised by the

family, it is apparent that any religious element in the education of the child is entirely a product of individual choice.

In conducting the constitutional inquiry, the Court should avoid three pitfalls that often characterized decisionmaking under the *Aguilar/Lemon* line of cases.

First, the Court should not allow the results of cases to hinge on contorted definitions of "direct" and "indirect" aid. The constitutional issue should be whether the decision to use aid in a religious setting is made by the individual or by the government. See *Zobrest*, 509 U.S. at 10 (because the aid "creates no financial incentive for parents to choose a sectarian school" over other options, it effectively ensures that assistance will be given to a sectarian school "only as a result of the private decision of individual parents" rather than as a result of "state decisionmaking"); *Rosenberger v. Rector of Univ. of Virginia*, 115 S. Ct. 2510, 2544-45 (1995) (Souter, J., dissenting) (noting that the Court's "indirect aid" cases "turned on the fact that the choice to benefit religion was made by a non-religious third party standing between the government and a religious institution").[6] When legislators or other government officials decide for themselves how much money to give to various recipients (as, for example, in the case of discretionary grants), there is reason to be concerned that government's decision will reflect favoritism rather than private choice – although the "per pupil" basis is not necessarily the only neutral measure. When school funds for schools are allocated on a per-

[6] These *amici* agree with Justice Souter that the fact that the funds were sent directly to the printer in *Rosenberger* was of no constitutional significance. The important point in *Rosenberger* is that all decisions about editorial content (including religious perspective) were made by the individual students who participated in the activity. The government played no part in the decisions regarding *Wide Awake*'s religious point of view.

pupil basis, however, there is no danger of allocative distortion, and it should not matter whether, as a formal matter, the funds are sent first to the parents or to the schools.

In *Grand Rapids*, 473 U.S. at 395, the Court characterized a remedial and enrichment program similar to Title I as "direct," and thus as unconstitutional, but the program is essentially no different from that upheld in *Zobrest*: both place public employees (teachers in Title I, sign-language interpreters in *Zobrest*) in private schools in order to help the students there receive a better secular education.[7] Aid allocation decisions under Title I are based on a per pupil formula, derived on the basis of educational and economic disadvantage. See 20 U.S.C. § 6321(a)(1) (special education services shall be provided "on an equitable basis," "[t]o the extent consistent with the number of eligible children . . . enrolled in private elementary and secondary schools"); *id.* § (a)(4) (expenditures for private school children shall be proportional "based on the number of children from low-income families who attend private schools"). The proportion of the aid that flows to students at religious schools is thus a product of private choice; there is no danger of favoritism or discrimination by government officials. This is sufficient to make the aid "indirect" for constitutional purposes.

Second, the Court must examine the program *as a whole* to determine whether *the government* has behaved in

[7] Indeed, the opinion in *Grand Rapids* seemingly used the terms "indirect" and "direct" as labels for forms of aid that the Court had upheld and struck down, respectively, rather than as having independent analytical content. See 473 U.S. at 393-94 (describing tuition tax benefits and loan of instructional materials as examples of "direct" aid to religious schools, and bus transportation and loan of textbooks as examples of "indirect" aid). This deprives the terms of any analytical content.

an appropriately neutral fashion, rather than focusing on specific applications of the program to see whether religion has been "advanced." So long as the government itself remains neutral, pursuing secular objectives and neither favoring nor disfavoring religion, it should not matter that individual citizens take advantage of the benefits of civil society to advance their religious objectives. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). The Court must "look[ ] to the nature and consequences of the program *viewed as a whole*." *Witters*, 474 U.S. at 492 (Powell, J. concurring).[8]

Third, the result should not be affected by the *form* of the aid. Many decisions between *Lemon* and *Aguilar* seemed to turn on whether the aid took the form of transportation, teachers' salaries, books, maps, film projectors, or school lunches. The theory seemed to be that only forms of aid that are "self-policing" – that require no continual monitoring to ensure that they lack any religious content – were permitted. This was necessary, the Court seemed to indicate, in order to satisfy the test of *Lemon* and *Aguilar* that there be "no religious uses" of the aid. The difficulty with this approach is that *every* input into nonpublic religious education has the effect of assisting both the religious and the nonreligious educational outputs. The distinctions therefore had no substance. Bus

[8] In the context of aid to education, it is important to evaluate aid to nonpublic schools in light of the fact that the entire cost of public, secular education is paid by the state. See *Committee for Public Education v. Nyquist*, 413 U.S. 756, 801-803 (1973) (Burger, C.J., dissenting). It is misleading to define aid to public schools as one "program" and aid to nonpublic schools as a separate "program," and then to complain that the second program discriminates in favor of nonpublic schools.

transportation was approved in *Everson* because bus transportation is nonreligious. But unless children get to school they cannot receive religious education; the transportation was an essential input to the entire educational program of the religious schools. By contrast, maintenance and repair of classroom facilities were disapproved in *Nyquist* because religious teaching might take place in the classrooms. But ceiling tiles are no more inherently religious than buses, and require no more monitoring. If it is constitutional to pay for an ideologically neutral form of transportation to school, it should have been constitutional to pay for an ideologically neutral roof over the children's heads.

By the same token, provision of textbooks was approved if the books were not themselves religious (*Board of Education v. Allen*, 392 U.S. 236 (1968)), but teacher salaries were not because teachers might teach in a religious way (*Lemon*). The same was true of instructional materials, such as maps and film projectors. But books – no less than maps or film projectors – can be *used* in a religious way. And school lunches warm the bellies of poor children during catechism class no less than during physics. It is simply not the case that these approved forms of aid did not advance or assist in the religious education at these schools. If the Court were serious that no aid that could serve the religious function of the schools is permissible, all forms of aid should be struck down.

Amici think the Court was asking the wrong question in these cases. The question should not be whether the aid could benefit religious teaching, but whether the aid advances the government's secular purposes. If the government's secular purposes are advanced to the same degree in religious schools as in secular schools, it should be a matter of indifference to the government whether the

school's religious purposes are also advanced. Any such advancement is only an incidental effect. To be sure, if the religious aspect of a school's program necessitates a greater expenditure of money, or causes the government aid to produce a lesser secular benefit, then the religious school should receive a lesser subvention. Private persons should bear the entire marginal cost of the religious component of education. But if the religious school is equally efficient in accomplishing the governmental purpose (educating schoolchildren), then it should be equally entitled to public support. The government should neither *penalize* nor *reward* the private choice of a religious education. As one commentator has urged, the government should be permitted to aid religious schools on a neutral basis "so long as such aid does not exceed the value of the secular educational service rendered by the school." Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Cal. L. Rev. 260, 265-66 (1968). When aid is limited in this fashion, it transgresses no Establishment Clause values.

To use a simple example: If the government provides G.I. Bill benefits to all qualified ex-military personnel, this will have several effects. First and foremost, it will promote the legitimate governmental objectives of fostering education and promoting military service. Second, it will serve the private interests of the recipients, including enhancing their freedom of choice about what educational institutions they can attend. Third, for whatever fraction of the recipient group that chooses to attend religious colleges, it will enable the recipient to receive and the college to provide religious higher education. The latter effect is "incidental" to the government's purpose, but it is nonetheless a "direct" and "substantial" benefit. Such a benefit is an inherent and inevitable result of a neutral governmental program, and should be deemed no

more problematic than the fact that churches, along with everyone else, benefit from police and fire protection.

As Justice Brennan explained in his concurring opinion in *Texas Monthly*, 489 U.S. at 10: "The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur." The touchstone of constitutionality is that government aid must serve the legitimate, nonsectarian "aims of government." If it does so, the Establishment Clause is not offended merely because it also serves the overlapping, sectarian, interests of religious groups.

B. The Lemon Test Should Be Reformulated Or Abandoned

In *Grand Rapids* and *Aguilar*, this Court held that Title I and a similar program at the state level violated the "effects" and "entanglement" prongs of the *Lemon* test. In our judgment, those conclusions help to identify conceptual defects in the *Lemon* test, which should be corrected.[9]

Although several Justices have criticized the *Lemon* test, and the Court has in recent cases refrained from relying on it, the test has not formally been jettisoned and it remains the predominant standard applied by state and lower courts. See, e.g., *Kiryas Joel*, 114 S. Ct. at 2515 (Scalia, J., dissenting) (noting that the Court there ignored *Lemon* although all the lower courts had relied on it). This presents two serious problems for Establishment Clause

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[9] The other element of *Lemon* – that the law have a secular purpose – is easily satisfied in this case and in other cases involving educational aid to religious schools.

jurisprudence in lower courts, for the legislatures and other officials who must conform their conduct to it, and for the citizens whose rights are affected by it. The first is the uncertainty produced when a decision is neither overruled nor reaffirmed. Lower courts simply do not know what to do. Should they do as this Court says (*i.e.*, follow *Lemon*), and perhaps be overruled for it? Or should they do as this Court does (*i.e.*, ignore *Lemon*), and decide cases on the basis of whatever reasoning seems most pertinent to the particular case? Affected parties are similarly at sea. It is very difficult for legislatures, lawyers, and litigants to anticipate the outcome of Establishment Clause controversies when the operative doctrine is unknown.

Second, even if lower courts and legislatures assume that the *Lemon* test is still authoritative, the ambiguities and contradictions in its possible meanings leave lower courts and legislatures – as well as affected religious groups and individuals – in doubt about its meaning. In practice, the *Lemon* test has created unnecessary conflicts with free exercise rights and with the proper approach of government impartiality toward religion.

These *amici* think the Court should abandon the *Lemon* test, and replace it with a standard of substantive neutrality, as suggested above. But if the Court wishes to retain *Lemon*, *amici* submit that the test should be clarified and reformulated in order to prevent continued unnecessary and destructive conflicts between the principles of free exercise and nonestablishment.

1. The Effects Prong. The key prong of *Lemon*, and indeed of any Establishment Clause test, is the requirement that government action not have the "primary effect" of "advancing" or "inhibiting" religion. The problems with this part of *Lemon* arise not from its language, but from its interpretation. As explained above, in one

line of cases, this prong was interpreted to prohibit the use of government resources by private persons for religious purposes. That interpretation led to the discriminatory exclusion of religious people and religious institutions from otherwise neutral benefits programs. If the "effects" of government action are evaluated as proposed in the preceding subsection, the Establishment and Free Exercise Clauses would be harmonized.

The approach *amici* propose is also consistent with both of the prominent alternatives to the *Lemon* test propounded by members of this Court in recent cases: the "endorsement" test and the "coercion" test. The purpose of the endorsement test is to "preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). The nondiscriminatory administration of a general program of benefits conveys a message "of neutrality rather than endorsement" (*Mergens*, 496 U.S. at 248); conversely, exclusion of religious individuals or groups from neutrally available benefits " 'would demonstrate not neutrality but hostility toward religion' " (*Rosenberger*, 115 S. Ct. at 2525 (O'Connor, J., concurring) (quotation omitted)).

The analysis *amici* propose is equally compatible with the "coercion" test. The purpose of the coercion test is to ensure that the power of the government is not deployed to force or induce religious belief or behavior. See *County of Allegheny v. ACLU*, 492 U.S. 573, 659-663 (1989) (Kennedy, J., concurring in part); *Lee v. Weisman*, 505 U.S. 577 (1992). That is precisely the objective of the proposed test. The allocation of resources is an important element of governmental power; it must not be used to favor, or to disfavor, religious exercise. The provision of neutral benefits to religious persons and organizations avoids such

coercion, while exclusion places pressure on them to give up their constitutionally protected rights of religious exercise. The test *amici* propose thus bridges the gap between the endorsement and coercion standards, while correcting the ambiguities in the effects test of *Lemon*.

2. The Entanglement Prong. The *Aguilar* decision itself was based on the ground that supervision of Title I remedial education in religious schools would create "excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine." 473 U.S. at 409. But the proposed reformulation of the effects test removes the need for any objectionable church-state entanglement in this and most other neutral aid programs. The church-state contacts that would remain are minimal and of no constitutional significance.

The particular kind of entanglement that most concerned the *Aguilar* Court was the "ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought." *Id.* at 413. Such surveillance would be necessary to ensure both that religious teaching did not occur in Title I classes and that religious symbols would not be visible in those classrooms. *Id.* The Court concluded that " '[t]he picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental "secularization of a creed." ' " *Id.* at 414 (quoting *Lemon*, 403 U.S., at 650 (opinion of Brennan, J.)).

Amici strongly agree that it is objectionable for state officials to monitor a religious school for religious influences, and to require the school to eliminate or marginalize its religious character in order to qualify for government assistance. But the answer cannot be to violate rights of religious freedom in a different way by

barring assistance to religious schools and to the families that use them, thereby penalizing them for educating their children in an environment consistent with their faith. The "difficult dilemma" caused "by the interaction of the 'effects' and entanglement prongs" (*Aguilar*, 473 U.S. at 418) (Powell, J., concurring)) is a dilemma that simply does not have to exist. The objectionable entanglement is due entirely to the Court's insistence, under the "effects" test, that all religious teaching and other religious elements be eliminated from the programs that receive government assistance. If, as discussed above, the receipt of government assistance for secular value is permissible without regard to the religious teaching that is mixed into the program, then the government will not be required to monitor the school for religious content and this entanglement problem simply will not arise.

In addition, the interference with the organization's religious mission should not be the basis for suits by outsiders, as taxpayers, under the Establishment Clause. The victims of this form of unconstitutional activity are those being monitored. See 473 U.S. at 413 (noting that "religious school . . . must endure the ongoing presence of state personnel" looking for religious content). It makes no sense to allow this issue to be raised by the school's opponents in litigation, who can scarcely be said to have the school's interests at heart. To the extent (if any) that "entanglement" injures the interests of outsiders, it can more sensibly be assimilated within the "effects" test, as Justice O'Connor has suggested. *Id.* at 430 (O'Connor, J., dissenting). In other respects, entanglement should be recognized as a free exercise problem, and only the church school should be able to raise it. "An atheist plaintiff asserting a church's right to be left alone even at the cost of losing government aid is the best possible illustration of why there are rules on standing."

Douglas Laycock, *The Right to Church Autonomy as Part of the Free Exercise of Religion*, in 2 Government Intervention in Religious Affairs 28, 38 (D. Kelley ed. 1986).

As a second form of objectionable entanglement, the *Aguilar* decision cited the "administrative cooperation" between state personnel and school officials in other matters not directly implicating religious concerns, such as "schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program." 473 U.S. at 413. These contacts, of course, would continue even if the government ceased surveillance of the religious content of school programs. But there is nothing objectionable about these contacts. In the complex modern world there necessarily will be numerous interactions between government officials and religious institutions. The ideal of "separation of church and state" does not mean, and cannot mean, that church and government have no contact. As Justice O'Connor pointed out, "[t]he State requires sectarian organizations to cooperate on a whole range of matters without thereby advancing religion or giving the impression that the government endorses religion." *Id.* at 430 (O'Connor, J., dissenting).

On the one hand, "entanglement" is necessary for the state to enforce its civil and regulatory law. Education agencies impose and enforce myriad curriculum, attendance, certification, fire, and safety regulations, on sectarian schools, all of which involve some degree of "entanglement." *Jaffree*, 472 U.S. at 110 (Rehnquist, J., dissenting); see also *Hernandez v. Commissioner*, 490 U.S. 680, 696-97 (1989). On the other hand, "entanglement" is also necessary if religious institutions are to participate on equal terms in the benefits as well as the burdens of

public life. In short: not all interactions between church and state are problematical.

The non-ideological "administrative cooperation" over scheduling, information, and students' progress cited in *Aguilar* is unobjectionable. Indeed, the accreditation process for private religious schools entails no less "entanglement" than this. These contacts are no different in kind from the administrative cooperation and communication needed in the context of administration of the tax laws (*Hernandez*, 490 U.S. at 696-97; *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 394-95 (1990)) or wage and hour laws (*Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985)), which the Court has unanimously upheld. It cannot be true that administrative entanglement is significant when a religious institution shares in a government benefit but not when it shares in the burden of taxation or regulation.

Amici therefore suggest that, if *Lemon* is to be retained, the concept of "entanglement" be expressly limited to governmental supervision or second-guessing of private speech or of activities or decisions by officials of religious institutions that have religious significance. That was the primary concern of the *Aguilar* Court (see 473 U.S. at 409-10 (expressing concern over state involvement "in matters of religious significance" and in "sacred matters")); and other forms of contact between church and state are unavoidable and unobjectionable. As already noted, the need for government involvement in the religious elements of a religious school is eliminated or greatly reduced if the government is not required to

monitor every program receiving aid to ensure it does not contain religious content.[10]

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[10] The final form of entanglement identified by the *Aguilar* Court as a reason for barring aid to religious schools is the perceived danger of "political divisiveness along religious lines." 473 U.S. at 414; see *id.* at 416-17 (Powell, J., concurring). This doctrine has already been largely repudiated by this Court. *Lynch v. Donnelly*, 465 U.S. at 684 ("this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct"); see also *Bowen v. Kendrick*, 487 U.S. 529, 617 n.14 (1989); *Corporation of Presiding Bishop v. Amos*, 483 U.S. at 339 n.17; *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring).

APPENDIX

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus the **Christian Legal Society** ("CLS"), through the **Center for Law and Religious Freedom** (the "Center"), its legal advocacy and information arm, has since 1975 argued in state and federal courts throughout the nation for the protection of religious speech, association and exercise. Founded in 1961, CLS is an ecumenical professional association of 4,500 Christian attorneys, judges, law students, and law professors, with chapters in every state and at 85 law schools.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise and the autonomy of religious institutions. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but

only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious liberty.

The **Association of Christian Schools International (ACSI)** is the largest association of evangelical Christian schools and colleges in the United States. Serving over 670,000 students, ACSI is dedicated to excellence in education that is Christian through the implementation of a Christ-centered philosophy of education. ACSI serves to promote professional excellence of teachers and administrators, a high level of student achievement and the rights of families with religious commitment to pursue biblically-based education for their children without the penalty of loss of public benefits available to American families generally. ACSI strives to stimulate continuous spiritual and professional growth of school personnel, while defending, and providing support for, religious schools and the rights of the schools' parents and students in the area of legal/legislative concerns. This case

articulates the legitimate need of religious school parents in trying to give their child the best education possible.

The **Catholic League for Religious and Civil Rights** is a nonprofit voluntary association, national in membership, organized to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life: The League is committed to ensuring the American people's continued enjoyment of the protections afforded religious freedom by the First Amendment to the Constitution, and it supports the religious freedom rights of Catholics and others through a wide range of activities.

The **Southern Baptist Convention** is the nation's largest Protestant denomination, with over 15.4 million members in over 38,400 local churches. **The Christian Life Commission** is the public policy agency of the Convention and is assigned to address religious liberty and other public policy issues. *Amicus* produces publications and seminars to educate Southern Baptists about ethical and moral issues in daily Christian life, and to advocate responsible Christian citizenship as part of biblical decision-making. *Amicus* also seeks to bring biblical principles and Southern Baptist convictions to bear upon public policy debates before courts, legislatures and policy-making bodies. *Amicus* frequently files briefs as *amicus curiae* in important religious liberty litigation, such as this case.

Family Research Council, Inc. (FRC), is a non-profit research and educational organization dedicated to the preservation and defense of traditional values and the family. FRC stands in defense of the principle that the religion clauses of the First Amendment do not require

discrimination against people or organizations based upon their religious speech or exercise. FRC seeks to support the rights of people of faith to participate as full and equal citizens in the public life of the nation.

Focus on the Family is a Colorado religious nonprofit corporation committed to strengthening the family in the United States and abroad. Focus on the Family distributes a radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and other western countries. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month. From its widespread network of listeners and subscribers, Focus on the Family receives an average of more than 33,000 letters each week and represents Americans numbering in the hundreds of thousands.

The **Lutheran Church-Missouri Synod** is the second largest Lutheran denomination in North America and the eleventh largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The congregations of the Synod operate approximately 2,000 elementary and secondary schools situated in most of the states of the United States. The Synod, on behalf of its congregations, schools, and individual members, objects to the denial or limitation of educational resources to children solely because those children attend religious schools.

The National Association of Evangelicals is a nonprofit association of evangelical Christian denominations,

churches, organizations, institutions and individuals. It includes some 43,500 churches from 74 denominations and serves a constituency of approximately 27 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The **Southern Center for Law & Ethics** is a nonprofit, publicly funded, tax-exempt corporation founded in 1985 and based in Birmingham, Alabama. Paramount to the Center's purpose is to develop an understanding of the relationship between law and religion. The Center's activities include: interaction and instruction with interested law students, lawyers, and members of the academic community; publication of articles and a journal of theology and law; providing legal counsel; and filing *amicus curiae* briefs on a variety of public issues, from the free speech rights of college professors to the legal status of midwives, related to the Center's purpose.

The Center has an interest in ensuring that religious citizens are not penalized for the exercise of their fundamental religious and parental rights. The Center also has an interest in establishment clause case law that will respect the history and traditions of the American people. These interests are implicated by this case.